gence, and the railroad's negligence in failing properly to inspect the knuckle. Compl. 1-4.

The knuckle is part of the coupling mechanism on a train. As this Court has explained:

> Railroad cars in a train are connected by couplers located at both ends of each car. A coupler consists of a knuckle joined to the end of a drawbar, which itself is fastened to a housing mechanism on the car. A knuckle is a clamp that interlocks with its mate, just as two cupped hands—placed palms together with the fingertips pointing in opposite directions—interlock when the fingers are curled. When cars come together, the open knuckle on one car engages a closed knuckle on the other car, automatically coupling the cars.

Norfolk & W. Ry. v. *Hiles*, 516 U.S. 400, 401-02 (1996) (footnote omitted). A knuckle weighs approximately 90 pounds. Tr. 112. When the knuckle is opened, it is normally held in place and prevented from falling from the drawbar by the knuckle pin. *Id.* at 51.

Knuckles are designed to break. Tr. 110. If stress is placed on a coupling during rail operations, it is preferable to replace the knuckle rather than have the drawbar break from the housing mechanism of the car. *Id.* at 113. Therefore, the replacing of knuckles (including lifting them into place) is a regular part of a conductor's job. *Id.* at 113, 286, 506-07. Knuckle replacement can be performed by one person, *id.* at 508, as Schumpert's own expert testified, *id.* at 140-43. Schumpert had replaced a knuckle on another train earlier on the same day as the accident. *Id.* at 72-73, 186-87. At no point did Schumpert submit any evidence to suggest that having a railroad employee replace a knuckle is negligent or unreasonable in any regard.

During the switching operation in question, Lusk prepared a railcar for coupling. Lusk failed to notice that the knuckle pin was missing from the railcar's drawbar. Tr. 50. When

Lusk opened the knuckle, it fell from the drawbar because there was no pin to hold it in place. *Id.*

When the knuckle fell, Schumpert was between 200 and 300 yards away. Tr. 200. Schumpert had heard that Lusk was pregnant, and so decided to lift and replace the knuckle himself, *id.* at 203, which he thought that he could do, having done so "on many occasions" in the past. *Id.* at 287-89. Schumpert began feeling discomfort in his shoulder approximately 30-45 minutes after the train departed the train yard, and began to perceive significant discomfort in his back four days later. *Id.* at 208-19. It is undisputed for present purposes that this pain resulted from the replacement of the knuckle.

C. Proceedings Below

Schumpert brought suit under FELA, alleging that NS negligently failed to provide a safe workplace; failed to maintain its equipment in safe working condition under the SAA; and failed to provide Schumpert with adequate assistance. Compl. 2. The case was tried to a jury in the Hall County State Court from November 3-7, 2003. Tr. 1. NS moved for a directed verdict on the negligence and SAA claims. *Id.* at 590-96, 600-02. Its motion was granted with regard to the SAA claim, *id.* at 604, and denied with regard to negligence, *id.* at 603. The jury returned a verdict against NS in the amount of $596,681.41. NS's motions for judgment notwithstanding the verdict, and for a new trial, were denied. Pet. App. 17a-19a.

NS appealed the verdict, and argued that it has no liability as a matter of law in a case where the railroad's supposed negligence merely creates a condition during which the plaintiff's injuries are otherwise caused (rather than causing the injuries themselves). Under such circumstances, causation is too attenuated to meet the standard set forth by this Court.

The Georgia Court of Appeals rejected that argument. It declined to apply *Davis* v. *Wolfe*, 263 U.S. 239 (1923), a de-

cision in which this Court set forth the standard of causation under FELA, and which this Court never has overruled. It reached that conclusion, at first, on the basis of the fundamental error that *Davis* had been overruled *sub silentio* by a subsequent decision of this Court, Pet. App. 14a & n.6, a determination that only this Court has the authority to make. For that reason, the decision below held that the injury Schumpert suffered when he lifted the knuckle in the usual manner—an action that Schumpert admitted was part of his job, and that he had performed numerous times—was nonetheless actionable under FELA.

Norfolk Southern filed a Motion for Reconsideration pointing out, among other things, that the state court lacked authority to declare precedents of this Court superseded by later decisions. The court denied the motion, and filed an amended opinion reaching the same result. Pet. App. 1a-8a. The court sought to cure its direct abrogation of Supreme Court precedent by removing the explicit reference to *Davis* having been superseded, compare *id.* at 6a-7a & n.6, with *id.* at 14a-15a & n.6, yet it left in place the holding that the causation test of *Davis* no longer is good law, and that lower court cases applying *Davis* were superseded, *id.* at 5a-7a & nn.6, 7. The Court of Appeals then added a conclusory statement at the end of the opinion that this case is "different" from *Davis* "because the negligence that led to the fallen knuckle can be seen as playing a part, 'even the slightest,' in producing Schumpert's injury." *Id.* at 7a (quoting *Rogers*, 352 U.S. at 506). It did not explain this inscrutable pronouncement. NS filed a petition for certiorari with the Georgia Supreme Court, which was denied. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court improperly held that the FELA proximate causation rule announced by this Court in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), "'no longer is good law'" in light of *Rogers* v. *Missouri Pacific Railroad*, 352

U.S. 500 (1957). Pet. App. 5a. Certiorari is justified because the lower court has committed the cardinal error of discarding precedent of this Court as superseded, which this Court has declared to be its exclusive prerogative. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Just as fundamentally, nothing in *Rogers* purports to overrule the longstanding rule of *Davis* and numerous other decisions of this Court defining FELA causation. *Rogers* simply vindicates the rule that a FELA claim shall be submitted to the jury if there is evidence that the railroad's negligence is *a contributory* (and not just *the sole*) proximate cause of an employee's injury. Indeed, *Rogers* specifically relies on precedents that restated the *Davis* rule. The petitioner in *Rogers* did not ask this Court to overrule prior precedent, and the strong policy of *stare decisis* in statutory interpretation forbids any inference that in *Rogers* this Court *sub silentio* overruled decades of causation precedents. The lower courts are divided over the effect of *Rogers* on rules of proximate causation, and this Court should act now to clarify this critical issue that affects jury instructions and liability in virtually every case arising under FELA.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BINDING PRECEDENT OF THIS COURT.

A. The Court Below Improperly Treated Precedents Of This Court As Superseded.

Under FELA, a railroad is liable in damages for an injury to an employee engaged in interstate commerce "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. The long-established standard of causation under FELA, set forth in numerous of this Court's precedents, is proximate cause: The plaintiff must prove that "negligence was the proximate cause in whole or in part" of the employee's injury. *Tennant*

v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944). Accordingly,

> "[T]o warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Brady v. *Southern Ry.*, 320 U.S. 476, 483 (1943). *Brady* is no outlier—this Court has stated repeatedly that proximate cause is the standard under FELA.[2]

In *Davis*, this Court reviewed and reconciled its precedents applying proximate cause,[3] and set forth the following elaboration on the rule of proximate cause:

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[2] *See, e.g.*, *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (same); *see also, e.g.*, *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913); *Davis* v. *Kennedy*, 266 U.S. 147, 148 (1924); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *New York Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Urie*, 337 U.S. at 195; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Carter*, 338 U.S. at 435; *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949).

[3] The claim in *Davis* was brought under the SAA, which is governed by the same rule of causation as any other FELA claim of negligence. *See Carter*, 338 U.S. at 434 (under the SAA, "the test of causal relation stated in the Employers' Liability Act is applicable"). Thus, the right of recovery against the railroad is limited to an "injury the proximate cause of which was a failure to comply with the requirement of the Act." *Brady*, 303 U.S. at 15 (internal quotation marks omitted); *St. Louis & S.F. R.R.* v. *Conarty*, 238 U.S. 243, 249 (1915); *Lang*, 255 U.S. at 461; *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these safety appliance

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury*; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243 (emphasis added).

In the decision below, however, the court mistakenly treated the rule of *Davis* as "'no longer ... good law.'" Pet. App. 5a. To be sure, on reconsideration it purged its opinion of the original, overt statement that *Rogers* had displaced *Davis*. But the court's reasoning remained the same, and it expressly held that decisions applying the *rule* of *Davis* were no longer good law. This cosmetic change did not eliminate the clear disregard of this Court's rule in *Davis*.

First, the court below embraced the Sixth Circuit's recent decision in *Richards* v. *Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir.), *cert. denied*, 540 U.S. 1096 (2003), in which the Sixth Circuit treated *Davis* as having been superseded. Pet. App. 4a-5a.[4] *Richards* rejected an earlier Sixth Circuit

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laws is the proximate cause of injury to them when engaged in the discharge of duty").

[4] The denial of certiorari in *Richards* in no way argues against granting certiorari here. The Court commonly permits an issue to percolate in the lower courts before itself addressing the issue. Robert L. Stern et al., *Supreme Court Practice* 225-32, 240-43 (8th ed. 2002); *compare, e.g.*, *United States ex rel. Garibaldi* v. *Orleans Parish Sch. Bd.*, 534 U.S. 1078 (2002) (denying certiorari), *with Cook County, Ill.* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) (addressing the same issue); *Norfolk & W.*

decision, *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), which quoted at length and relied upon *Davis*. It did so on the theory that the distinction, drawn in *Davis* and reaffirmed in *Reetz*, between injuries from an "incidental situation" created by the railroad's act, and injuries caused by the act itself, did not survive *Rogers*. See *Richards*, 330 F.3d at 437. The Sixth Circuit so concluded even though this distinction was drawn in *Davis* itself, 263 U.S. at 243, and *Rogers* never hinted at overruling *Davis*. Thus, *Richards* improperly held that the rule of *Reetz*, and logically the rule in *Davis*, are "no longer ... good law" in light of *Rogers*. 330 F.3d at 437. It is precisely this mistaken holding of *Richards* that was relied upon by the court below. Pet. App. 5a.

Likewise, the state court declared that the rule announced in its earlier decision of *Powell* v. *Walters*, 190 S.E. 615 (Ga. Ct. App. 1937), which like *Reetz* simply applied the *Davis* causation test, *id.* at 619-21, was "not controlling" because it was inconsistent with *Rogers*. Pet. App. 6a & n.7 (noting that *Powell*, and other Georgia decisions that follow *Davis*, "are based on the reasoning of the now overruled *Reetz* or similar reasoning," and therefore "are not controlling"). The state court, despite withdrawing its explicit statement of the demise of *Davis*, has thus squarely held that the *rule* of *Davis* is no longer good law, and it refused to apply it. That is abrogation of this Court's precedents in substance if not in name.

Certiorari should be granted simply because the court below did not have authority to depart from the *Davis* rule in deciding this case, regardless of the effect of *Rogers*. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which di-

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Ry. v. *Dye*, 533 U.S. 950 (2001) (denying certiorari), *with Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135 (2002) (addressing the same issue); *Franklin & Marshall Coll.* v. *EEOC*, 476 U.S. 1163 (1986) (denying certiorari), *with University of Pa.* v. *EEOC*, 493 U.S. 182 (1990) (addressing the same issue).

rectly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484; *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents").

B. *Rogers* v. *Missouri* Did Not Overrule This Court's Prior Precedents Establishing Proximate Cause As The FELA Standard.

Equally important, this Court's review is necessary because the lower court's decision is based on a wholesale misreading of *Rogers*. *Rogers* did not overrule *Davis* or any of the numerous precedents of this Court establishing the rule of proximate cause under FELA. Rather, *Rogers* rejected a particular common-law conception of "proximate cause" that required a showing that the railroad's wrongful act was the "sole, efficient, producing cause of injury." 352 U.S. at 506. That precise formulation was contrary to both the plain language of FELA and this Court's precedents. *Rogers* simply made clear that in circumstances where the jury could find either the employee's or the railroad's negligence to be the legal cause of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was slight. *Id.*

Even before *Rogers*, this Court had not hesitated to reverse lower courts that used language of "proximate cause" in this fashion to deny plaintiffs a jury determination of their FELA claim against the railroad. Thus, in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), the lower court had held that a railroad's SAA violation (which caused a freight train to come to a sudden stop because of a brake malfunction) was not the proximate cause of the employee's death; it had reasoned that, because the employee could have avoided the accident if he had not been negligent in failing to brake the motor car that was following the train on the same tracks, the railroad's violation of the SAA was only a "'cause' in the 'philosophical sense'" of the fatal accident. In reversing, this Court held that "the introduction of dialectical subtleties can serve no useful

interpretative purpose," given FELA's plain declaration "that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained." *Id.* at 523-24. But, in reversing the lower court's *application* of the proximate-cause doctrine to the facts of that case, this Court in *Coray* explicitly stated that the proximate-cause standard of *Davis* remained the rule under FELA; it held that "petitioner was entitled to recover if this defective equipment was the sole *or a contributory proximate cause* of the decedent employee's death. *Davis v. Wolfe*, 263 U.S. 239, 243; *Spokane & I.E.R. Co. v. Campbell*, 241 U.S. 497, 509-10." *Coray*, 335 U.S. at 523 (emphasis added).

Rogers, like *Coray*, was a case in which the state court had improperly taken the case away from the jury even though there was evidence that the railroad's negligence was one of two possible legal causes of his injury. In *Rogers*, the employee had been burning weeds on a sloping track bed. When a train passed, it fanned the flames of the fire he had created, and forced the employee back onto a culvert where he slipped on gravel and fell off the culvert, injuring himself. The employee adduced evidence that the railroad was negligent in requiring him to work near the tracks where passing trains could fan the flames around him, and in failing to maintain the surface of the culvert; the railroad countered with evidence that the plaintiff was negligent in not watching his fire. 352 U.S. at 502-04. The Court expressly stated that, on the evidence presented, the jury could have found either the employee or the railroad to have been the legal cause of the injury. *Id.* at 504.

But, even though the jury had found for the plaintiff, the Missouri Supreme Court reversed, in part on the ground that the employee's "conduct was at least as probable a cause for his mishap as any negligence of the [railroad], and that in such case there was no case for the jury." *Id.* at 505. The state court had erroneously ruled that "there is no jury ques-

tion in actions under this statute ... unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected." *Id.* at 505-06. According to this Court, the lower court improperly invoked "language of proximate causation which makes a jury question dependent upon whether the jury may find that *the defendant's negligence was the sole, efficient, producing cause of injury*." *Id.* at 506 (emphasis added). A rule that the railroad's negligence must be "the sole, efficient, producing cause of injury" is contrary to the statutory directive that renders railroads liable if they are a partial cause of the employee's injury. 45 U.S.C. § 51. Accordingly, this Court held that, "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506 & n.11 (citing *Coray*, 335 U.S. 520 (1949)). If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507.

There is no colorable reading of *Rogers* as overruling the *Davis* causation standard. Rather, *Rogers* held that when there is evidence, no matter how slight, that is sufficient to support a verdict against the railroad (*i.e.*, to support a finding that the railroad's negligence was a legal cause of the injury), but also evidence to support a finding that the plaintiff's negligence was the cause of the injury, *id.* at 504, the plaintiff's claim against the railroad must go to the jury, *id.* at 506. The existence of a jury question was not "dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.*

In short, *Rogers* was not creating new law; it simply restated settled law under FELA for cases involving multiple causation. See, *e.g.*, *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921) ("Under this act the railroad company is liable, if its negligence contributes proximately to the injury, no mat-

ter how slightly, and no matter how great may be the negligence of the employee."); *New York Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff"); *Atlantic Coast Line R.R.* v. *McIntosh*, 198 So. 92, 96 (Fla. 1940) (Brown, J., dissenting in part and expressing the opinion of the court with regard to this issue). Thus, the evidence must allow the jury to find that the railroad's negligence is a proximate cause of the injury. If so, even if the evidence suggests another cause was a much more substantial factor in the injury, the claim against the railroad must be allowed to go to the jury no matter how slight its contribution relative to other causes.

More particularly, nothing in *Rogers* questions the long-standing FELA rule for determining the threshold question of when a railroad's negligence is a legal cause of the injury: namely, whether the injury is "'the natural and probable consequence of the negligence or wrongful act,'" *Brady*, 320 U.S. at 483. The railroad's wrongful act must be "a proximate cause of the accident which results in his injury," and not "merely create[] an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243.

Rogers itself confirms this understanding. It explicitly derives its "test of a jury case" from *Coray*, see *Rogers*, 352 U.S. at 506 & n.11, and *Coray* (as noted above) reaffirms, citing *Davis*, that the railroad's negligence must be either "the sole or a contributory proximate cause" of the employee's injury. *Coray*, 335 U.S. at 523. Moreover, *Rogers* observed in a footnote that in cases involving violations of the SAA, the jury could not consider the plaintiff's contributory negligence, and "[t]he only issue then remaining is causation," citing *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949). *Rogers*, 352 U.S. at 507 & n.13. *Carter* (quoting *Coray*, 335 U.S. at 523) likewise holds that the railroad can

only be held liable if "the jury determines that the defendant's breach is 'a contributory proximate cause' of injury." *Carter*, 338 U.S. at 435. Indeed, this Court has recognized that *Davis* remains good law in a case decided after *Rogers*. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 434 (1958).

It is significant that none of the dissenting justices in *Rogers* read that case as a sweeping abrogation of prior precedent regarding FELA's causation standard. Justice Frankfurter would simply have dismissed the writ as improvidently granted because he regarded *Rogers* as yet another "insignificant" FELA case about the sufficiency of the evidence. *Ferguson*, 352 U.S. at 546 (Frankfurter, J., dissenting).[5] He noted that, although the Act abolished certain defenses to liability, it was the "historic cause of action for negligence as it developed from the common law," *id.* at 538, with the proviso that "on the question of causality, the statute had tried to avoid issues about 'sole proximate cause,' meeting the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence," *id.* at 538 n.7. Justice Frankfurter gave *Rogers* the interpretation set forth above, and did not understand the majority to have abolished proximate cause in contravention of existing precedent.[6]

Nor did the petitioner in *Rogers* ever ask the Court to overrule *Davis* or any other precedent of this Court establishing

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[5] Justice Frankfurter's dissent in *Ferguson* also applied to *Rogers* and two other cases. 352 U.S. at 524 n.*. Similarly, Justice Harlan filed a single opinion that dissented from *Ferguson*, *Rogers* and one other case, and concurred in the fourth case. *Id.* at 559 n.*.

[6] Justice Harlan agreed with Justice Frankfurter that certiorari never should have been granted, but felt compelled to reach the merits. *Ferguson*, 352 U.S. at 559-62 (Harlan, J., dissenting). He dissented simply because he viewed the Court as substituting its judgment for the lower court's, and alternatively as applying a sufficiency-of-the-evidence standard inconsistent with typical common-law review of jury verdicts. *Id.* at 562-64.

proximate cause as the FELA standard. His position was simply that the railroad's "negligence was the proximate cause of petitioner's injury," and that by allowing recovery for injuries caused "in part" by the railroad's negligence, FELA had "broadened" the causation standard from "the old concept of proximate cause," wherein "th[e] cause must have been direct, the complete, the responsible, the efficient cause of the injury." Pet. Br. at 4, 24-25, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28) (capitalization omitted). The railroad should be held liable, he argued, even if "some other factor may logically be said to be more influential in producing the injury." *Id.* at 27.

C. The Decision Below Cannot Be Reconciled With This Court's Proximate Cause Precedents Or With *Rogers* And Threatens An Unwarranted Expansion Of Railroad Liability.

Substituting "slightest" cause as the standard for legal cause under FELA in place of the *Davis* proximate cause rule would cause a dramatic and unwarranted expansion of railroad liability. Tort law has always differentiated legal cause from cause-in-fact, see *Restatement (Second) of Torts* § 435 (1965), but a "slightest cause" standard—or, as some courts have termed it, a "'featherweight'" causation standard, *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988)—is not materially different from but-for causation. Applying such a standard "would be but a lottery, and purposeless." *Porter* v. *Bangor & Aroostook R.R.*, 75 F.3d 70, 72 (1st Cir. 1996). Absent a requirement that the railroad's negligence be a proximate cause of the employee's injury, FELA becomes less a tort statute than a worker's compensation statute for any wrongful act, but without the limitations on recovery that typically are embodied in worker's compen-

sation statutes. See *Carter*, 338 U.S. at 437-38 (Frankfurter, J.).[7]

The Georgia Court of Appeals made the conclusory statement that this case was "different" from *Davis* "because the negligence that led to the fallen knuckle can be seen as playing a part, 'even the slightest,' in producing Schumpert's injury." Pet. App. 7a (quoting *Rogers*, 352 U.S. at 506). That is no distinction of the *Davis* proximate cause rule. In the coupler cases from which *Davis* derived its rule, the railroad's default had certainly played the "slightest" part in the injury; indeed, "the collisions would not have resulted in injuries to them had the couplers been on the standing cars," and yet no proximate cause was found because (as here) the default did no more than create the condition in which an otherwise-caused injury occurred. *Davis*, 263 U.S. at 242-43. A slightest cause test is irreconcilable with a proximate cause test.

Even the court below could not accept the consequences of reading *Rogers* to state the definition of legal cause as any factor "playing even the slightest" part in the injury. Therefore, it joined the Sixth Circuit in adopting a novel test: the injury must be "'"within the risk created by"'" the railroad's negligence, for otherwise the "'connection'" between the wrong and the injury could "'become too attenuated.'" Pet. App. 5a & n.5 (quoting *Richards*, 330 F.3d at 437 & n.5). This amorphous "within the risk" test has no foundation in

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[7] FELA's causation standard also applies to the BIA and SAA, a fact that heightens the practical impact of the lower court's mistaken slightest-cause standard. Under those statutes, the railroad's duties are absolute and the contributory negligence of the employee cannot be considered to reduce damages. *See* 45 U.S.C. § 53; *Rogers*, 352 U.S. at 507 n.13. Congress intended absolute liability for injuries that are the "'natural and probable consequence[s]'" of the statutory violation, *Brady*, 320 U.S. at 483, but not for all injuries with only the slightest causal connection to a violation, including ones in which the violation "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury," *Davis*, 263 U.S. at 243.

Rogers, nor anywhere else in tort law. It is the doctrine of proximate causation, as set forth in decisions of this Court, that prevents FELA liability when the connection between act and injury is too attenuated. Neither the court below nor the Sixth Circuit had any authority to create a new test of proximacy that is in conflict with the proximate cause rule announced in *Davis*.

Indeed, the ruling below cannot be reconciled with any proper conception of proximate causation. In a seminal case defining proximate cause, which was later followed as stating the standard applicable under FELA, see *Brady*, 320 U.S. at 483, this Court held that proximate causation requires "an unbroken connection between the wrongful act and the injury, a continuous operation," forming "a continuous succession of events, so linked together as to make a natural whole." *Milwaukee & Saint Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876). Under the Restatement of Torts, which uses terms that parallel the *Davis* test, causation turns on whether the defendant's conduct has "created a force or series of forces which are in continuous and active operation up to the time of the harm," and not simply "created a situation harmless unless acted upon by other forces for which the actor is not responsible." *Restatement (Second) of Torts* § 433(b).

Here, Lusk's failure to check the knuckle pin did not create forces that injured Schumpert; this is not a case where the knuckle fell on a co-worker's foot, or where a miscoupling created dangers for the employees working with the railcar. *Minneapolis & St. Paul Ry.*, 269 U.S. at 410; *Powell*, 190 S.E. at 620-21. Rather, the forces set in motion by Lusk's failure to secure the knuckle were spent when the knuckle fell harmlessly to the ground. A 90-pound knuckle on the ground is not a dangerous condition. It is commonplace for knuckles to break; they are designed to do so under certain circumstances, Tr. 110, 113. Lifting and replacing knuckles is part of a conductor's job, *id.* at 113, 286, 506-07, as Schumpert conceded, *id.* at 286-89. The proximate cause of Schumpert's

injury was not any negligence on the part of Lusk, but his lifting the knuckle off the ground. Lusk's actions simply created "an incidental condition or situation" in which Schumpert injured himself lifting the knuckle, *Davis*, 263 U.S. at 243, and such acts do not create liability under FELA. It would be absurd to think Congress would impose liability for negligence simply because an employee lifted a heavy object that was part and parcel of his job, and his body failed at that moment. Such logic would amount to a rule that because Schumpert was hurt during his employment, Norfolk Southern is liable. That is little different in practice from no-fault worker's compensation (which this Court has held that FELA is not). Under the rule below, the railroad is worse off than most companies subject to worker's compensation statutes: it is subject to broad liability for workplace injuries, but is at risk of much greater tort damages for any given injury. This Court should grant review to restore the rule of *Davis*.

* * * *

Under *Davis*, a FELA claim cannot go to the jury if the railroad's wrongful act "is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Id.* *Rogers* simply adds that, if the evidence would permit a jury to choose among multiple possible legal causes of the injury (such as the employee's and the railroad's negligence), the claim against the railroad must be allowed to go to the jury even if the railroad's negligence played the "slightest" part in the injury; such negligence need not be shown to be "the sole, efficient, producing cause of injury." 352 U.S. at 506. The lower court not only lacked authority to say that *Rogers* superseded the rule of *Davis*, but it was wrong on that score. This Court should grant review to preserve its exclusive prerogative of determining the validity of its precedents, and should reaffirm the rule of *Davis* and its operation in tandem and harmony with *Rogers*.

II. THE DECISION BELOW WIDENS VARIOUS CONFLICTS OVER THE MEANING OF *ROGERS* AND THE CAUSATION RULE APPLICABLE UNDER FELA.

Review is further warranted because the decision below widens conflicts among the lower courts over the standard of causation applicable under FELA.

1. As a threshold matter, various courts have held—consistent with the discussion in Part I of this Petition—that *Rogers* did not speak to the continuing validity of proximate causation under FELA, but instead dealt with multiple causation and the test of a jury case. Those courts have properly read *Rogers* as simply eliminating one particular, outmoded common-law conception of proximate causation that required the railroad's negligence to be the complete or dominant cause of injury. *Strobel* v. *Chicago, Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-200 (Minn. 1959) (holding that *Rogers* rejects "[t]he definition of proximate cause as the 'dominant' or 'predominant' cause"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) ("the *Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"). Those authorities are in conflict with the decision below and others like it, which interpret *Rogers* as modifying the standard of causation under FELA. See *infra* at 22-23.

2. Furthermore, there is a second, deep conflict among numerous courts over FELA's standard of causation. On the one hand, various courts state—properly, in Petitioner's view, but in conflict with the decision below—that a plaintiff attempting to prove liability under FELA must demonstrate that his employer's conduct was a proximate cause of his injury. These include both federal courts of appeals and state supreme courts. In *Reed* v. *Pennsylvania Railroad*, for instance, the Ohio Supreme Court squarely held that a plaintiff must show proximate cause to prevail under FELA. 171 N.E.2d 718, 721-22 & n.3 (Ohio 1961). The plaintiff was injured af-

ter the train stopped because of brake problems. Plaintiff sued, and a directed verdict was entered against him, which was ultimately affirmed by the Ohio Supreme Court.

The Ohio Supreme Court rejected plaintiff's claim because he was unable to demonstrate proximate cause. *Id.* at 721. Citing both *Carter* v. *Atlanta & St. Andrews Bay Railway* and *Davis* v. *Wolfe*, the court held that liability under the SAA requires a showing of proximate cause: "In order to support recovery for an injury claimed to have been caused by a violation of the Federal Safety Appliance Act, such violation must amount to *a* proximate cause of such injury although it need not be *the* proximate cause thereof." *Id.* at 721 n.3; see *id.* at 721 ("such violation could not legally amount to a proximate cause of the injury"). That court obviously did not view *Rogers* as having undermined this standard, for it elsewhere cited *Rogers*, but did not do so in this context. *Id.* at 720 n.1.

In *Chapman* v. *Union Pacific Railroad*, 467 N.W.2d 388, 395 (Neb. 1991), the Nebraska Supreme Court likewise held that FELA requires a showing of proximate cause: "To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury." See also *id.* ("'To prevail in an action based on negligence, a plaintiff must prove ... proximate causation ...."); *id.* at 396 ("a Federal Employer's Liability Act plaintiff must prove proximate cause" (citing *Chesapeake & Ohio Ry.* v. *Carnahan*, 241 U.S. 241 (1916)).

And in *Marazzato*, the Montana Supreme Court expressly rejected the argument that *Rogers* lowered a plaintiff's burden of proof. 817 P.2d at 674-75. Rather, it concluded, *Rogers*' purpose was to establish standards that govern multiple causation and contributory negligence. *Id.* at 674. In so reasoning, the court squarely held that proximate cause remains the rule under FELA: "The plaintiff has the burden of proving that

defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. *Id.* at 675.

Federal circuit courts, as well as other state supreme courts, have likewise recognized the rule of proximate cause even after *Rogers*, and have rejected claims of "slightest" or but-for causation. See *Porter*, 75 F.3d at 71-72 (rejecting but-for cause as "a lottery"); *Reed* v. *Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128, 130 (3d Cir. 1991) (a violation of the SAA is "'in itself an actionable wrong, in no way dependent upon negligence *and for the proximate results of which there is liability*'" (emphasis added) (quoting *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949))); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("'to entitle plaintiff to recover the proof must justify with reason that the injury complained of resulted, in whole or in part, from negligence of defendant which contributed proximately to the cause of the injury'"); *Lyles* v. *Alabama State Docks Terminal Ry.*, 730 So. 2d 123, 125 (Ala. 1998) (citing *Davis* as setting forth the causation standard under FELA); *Orchelle* v. *CSX Transp., Inc.*, 574 So. 2d 749, 752 (Ala. 1990) ("a railroad employee should be allowed to recover 'if the failure to comply with the requirements of the [SAA] is a proximate cause of the accident'" (alteration in original) (quoting *Davis*, 263 U.S. at 243));[8] *Snipes* v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) ("[r]ecovery under the FELA requires an injured employee to prove ... that the [employer's] negligence *proximately caused*, in whole or in part, the accident" (emphasis added)).[9]

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[8] The Alabama Supreme Court, in an earlier FELA case not involving the SAA, had interpreted the *Rogers* "slightest part" standard as "'either departing from, or eliminating in toto, the common-law concept of proximate cause.'" *Seaboard Coast Line R.R.* v. *Moore*, 479 So. 2d 1131, 1137 (Ala. 1985) (per curiam). It is not clear whether Alabama suffers from internal conflict, or purports to apply a different causation standard to SAA than to negligence claims.

[9] These are only the cases post-*Rogers* that continue to recognize a proximate cause standard. In other States, there exist pre-*Rogers* cases

In marked contrast to these cases, the court below has now joined arms with other courts that permit FELA liability to arise on a showing of extraordinarily tangential "'featherweight'" causation. *Johnson*, 845 F.2d at 1352; *accord Richards*, 330 F.3d at 434 (holding that FELA requires "'not much more'" "'than a scintilla of evidence'"); *Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (*Rogers* constituted a "departure from traditional common-law tests of proximate causation"; accordingly, a jury instruction regarding proximate cause was error); *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985) (contrasting the *Rogers* standard with proximate cause).

In addition to the Fifth and Sixth Circuits, courts that interpret *Rogers* to have imposed a new, relaxed standard of causation include the Second, Seventh, Eighth, Ninth and Tenth Circuits. See *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("to impose liability on the defendant, the negligence need *not* be the proximate cause of the injury" (emphasis added)); *Ulfik* v. *Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Holbrook* v. *Norfolk S. Ry.*, 414 F.3d 739, 741-42 (7th Cir. 2005) ("a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case"); *Nordgren* v. *Burlington N. Ry.*, 101 F.3d 1246, 1249 (8th Cir. 1996) ("the [Supreme] Court has held that relaxed standards apply under FELA ... for causation"); *Oglesby* v. *Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993) ("'proximate cause' is not required under the FELA"); *Summers* v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) (holding that *Rogers* "definitively abandoned" proximate causation); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972) ("the concept of

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that remain good law in their jurisdictions, and that likewise require a showing of proximate cause. *E.g.*, *Crozier* v. *Charleston & W.C. Ry.*, 71 S.E.2d 800, 802, 804, 806 (S.C. 1952); *Johnson* v. *Chicago Great W. Ry.*, 64 N.W.2d 372, 375-77 & nn.1, 5-6 (Minn. 1954); *Strobel*, 96 N.W.2d at 200; *see also* cases cited *supra* at 13-14.

proximate cause no longer has any place in an action under the Federal Safety Appliance Act").[10]

In short, there is a square, deep conflict among the federal circuit courts and state supreme courts concerning the standard of causation under FELA.

What makes this conflict particularly important is that there are a number of conflicts between the highest court in a State and the federal circuit court with jurisdiction over that State. In those jurisdictions, the outcome of a FELA case is likely to depend on the happenstance of filing in federal district court on one side of the street, or the state court just across the way. There are federal-state conflicts in Ohio, compare *Richards*, 330 F.3d at 437, with *Reed*, 171 N.E.2d at 721-22 & n.3; Iowa, compare *Snipes*, 484 N.W.2d at 164, with *Nordgren*, 101 F.3d at 1249; Montana, compare *Marazzato*, 817 P.2d at 675, with *Oglesby*, 6 F.3d at 607; and Nebraska, compare *Chapman*, 467 N.W.2d at 395, with *Nordgren*, 101 F.3d at 1249. This is an intolerable situation and one the Court has refused to tolerate in the past. See *Hiles*, 516 U.S. at 403 & n.2.

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[10] Many of these courts, which take a broad reading of *Rogers* without close analysis of that case, rely on statements in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) that FELA employs a "relaxed standard" of causation, *id.* at 543, and in *Crane v. Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), that a FELA plaintiff "is not required to prove common-law proximate causation," *id.* at 166. Those statements are true insofar as they mean that *Rogers* rejected the older common law conception of "proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506. Indeed, *Davis* itself was regarded as a "liberal" interpretation of the "resulting in whole or in part" language of FELA. *Brady*, 303 U.S. at 15. In any event, such dicta cannot support the overruling of the many cases of this Court holding that proximate cause is the longstanding rule under FELA. This Court should act to clear up any confusion.

All of this disarray stems from a patent misinterpretation of *Rogers*. This Court should act now to bring clarity and closure to this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 27, 2005

APPENDICES

APPENDIX A

COURT OF APPEALS OF GEORGIA

No. A04A1438

NORFOLK SOUTHERN RAILWAY COMPANY,

v.

SCHUMPERT.

Nov. 10, 2004

Reconsideration Denied Dec. 8, 2004
Certiorari Denied June 30, 2005

ADAMS, Judge.

Under the Federal Employers' Liability Act (FELA), railroad companies are liable for injuries to their employees that result in whole or in part from company negligence. In this case, company negligence caused a railroad car coupling device to fall to the ground. Conductor James Hugh Schumpert injured his back when he replaced the 90-pound device. The main issue presented here is whether his injury can be said to have resulted, either in whole or in part, from the negligence that caused the device to fall.

Schumpert sued Norfolk Southern Railway Company (NSRC) for his injury and based his complaint on FELA[1] and the Federal Safety Appliance Act (FSAA).[2] Following a jury trial, NSRC moved for a directed verdict with regard to both claims. The trial court granted the motion on the FSAA claim

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[1] 45 U.S.C. § 51 et seq.

[2] 49 U.S.C. § 20301 et seq.

but denied it on the FELA claim. Thereafter, the jury returned a verdict against NSRC in the amount of $596,681.41, which was entered as the court's judgment. NSRC moved for judgment notwithstanding the verdict and for new trial. The trial court denied the motions, and NSRC appeals.

The standard of review in this situation is well known:

> In determining whether the trial court erred by denying [the appellant's] . . . motion[ ] for judgment n.o.v., this court must view and resolve the evidence and any doubt or ambiguity in favor of the verdict. A directed verdict and judgment n.o.v. are not proper unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a certain verdict.

(Citation omitted.) *Irwin County v. Owens*, 256 Ga.App. 359, 360(2), 568 S.E.2d 578 (2002).

The parties largely agree on the material facts. Construing those facts in favor of the verdict, the evidence shows that Schumpert was the NSRC conductor assigned to move a train from Atlanta to Commerce, Georgia, on August 20, 1999. During the trip, some of the train cars had to be turned around, which required a switching operation. Utility brakeman Debra Lusk assisted with this operation, which involved separating some of the cars to turn them around and then reassembling the train.

The part of a train car's coupler that interlocks with another car's coupler is called a "knuckle." Knuckles, which are attached to drawbars that are fastened to the housing of the train car, are designed to break off under certain conditions so as not to damage the drawbar and the car itself. A "knuckle pin" holds the knuckle in place when the knuckle is in the open position, but a pin is not required when the knuckle is in the closed position (even when the car is coupled to another car). In order to perform the required switching operation,

Lusk had to open knuckles on cars that were going to be connected to the reassembled train. Lusk negligently failed to notice a missing pin on one knuckle, and when she opened it, the knuckle fell harmlessly to the ground.

Schumpert was 200 to 300 yards away at the time, but he came over to help. Lusk was pregnant, which Schumpert had heard, and so Schumpert decided to replace the knuckle himself. There was expert testimony that replacing a knuckle is a two-man job, but there was also testimony that it could be performed by one person. Schumpert believed that he was capable of replacing the knuckle himself because he had done so "over and over again" in the past; he considered it a regular part of his job. In fact, he had replaced a different knuckle earlier that same day. Lusk, too, had replaced four knuckles by herself in the past.

The parties do not dispute on appeal that Schumpert was injured as a result of lifting the knuckle to replace it. And there is no contention that Schumpert himself was negligent in any way. Rather, the causation question in this case is whether the negligence that led the knuckle to fall can be said to have caused Schumpert's injury because he had to replace the fallen knuckle.

1. The common law definition of causation is not applicable here, as even NSRC acknowledged at oral argument. The United States Supreme Court has called FELA "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958). FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. [Cit.]" Id.

Under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v.*

Missouri Pacific R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).[3] Nevertheless, some evidence of causation is required; FELA is not a no-fault workers' compensation statute. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994). Whether the employee's own negligence contributed to the injury is immaterial unless it can be seen as the sole proximate cause of the accident. See, e.g., *Kelson v. Central of Ga. R. Co.*, 234 Ga.App. 200, 505 S.E.2d 803 (1998).

NSRC characterizes Schumpert's claim as follows: "'But for' Lusk's failure to observe the missing knuckle pin, [Schumpert] would not have been faced with the task of replacing a knuckle." NSRC contends that 'but for' causation is insufficient. We find, however, that more than 'but for'" causation is present here.

Federal law interpreting FELA governs this issue. *Bagley v. CSX Transp.*, 219 Ga.App. 544, 545-546, 465 S.E.2d 706 (1995). A recent federal case on FELA causation guides our analysis. See *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir.2003), cert. denied, *Consolidated Rail Corp. v. Richards*, 540 U.S. 1096, 124 S.Ct. 961, 157 L.Ed.2d 807.[4] In that case a train made an unexpected stop as a result of an alleged defect in the braking system. In response, Conductor Richards attempted to determine the cause of the stop by walking the length of the train and inspecting for visible causes. *Richards*, 330 F.3d at 431. At some point, Richards lost his footing and allegedly injured his back. Id.

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[3] As stated in the FELA, the carrier is liable for injuries or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51.

[4] Although *Richards* is analyzed under the FSAA, causation analysis under FELA and FSAA are the same. *Richards*, 330 F.3d at 433, n. 2.

The Sixth Circuit was faced with long-standing precedent from its own court in which it had been held that there was a difference between an act of negligence that causes an injury and one that merely creates a condition or incidental situation under which an employee is injured:

> [T]here is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.

Reetz v. Chicago & Erie R. Co., 46 F.2d 50, 52 (6th Cir. 1931). The *Richards* court noted that in 1957, in the critical *Rogers* decision mentioned above, the United States Supreme Court announced a relaxed test for establishing causation in FELA cases. *Richards*, 330 F.3d at 433. After analyzing that standard and cases interpreting it, the *Richards* court "rejected *Reetz* in light of *Rogers* and [held] that *Reetz* no longer is good law." Id. at 437. The *Richards* court reiterated the *Rogers* test and further explained "that if a reasonable jury could find that the plaintiff's injury 'was within the risk created by' the defective appliance [or the negligence], the plaintiff's right to a jury trial should be preserved." Id.

> For example, if as a result of a defective appliance a plaintiff is required to take certain actions and he or she is injured while taking those actions, the issue of causation generally should be submitted to a jury.

Id. Accordingly, the *Richards* court held that there was a question of material fact regarding whether the allegedly defective brakes caused Richards's injurious fall.[5]

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[5] In a footnote, the *Richards* court explained that there are limitations to its decision:

> Admittedly scenarios will arise where the connection between the defective appliance and the plaintiff's injuries become too atten-

We therefore conclude that the trial court properly submitted to the jury the question of whether NSRC's negligence played any part, even the slightest, in causing Schumpert's injury. Schumpert was acting directly in response to the negligence and he was lifting the very item that fell due to the negligence. His injury can be seen as being within the risk created by NSRC's negligence. Our conclusion is consistent with one federal case and one state case that have addressed the same set of facts. See *Chicago &c. R. Co. v. Goldhammer*, 79 F.2d 272 (8th Cir.1935), cert. denied, 296 U.S. 655, 56 S.Ct. 382, 80 L.Ed. 467 (1936); *Hendrick v. CSX Transp.*, 575 S.2d 709 (Fla.App.1991). In each case the court specifically concluded that the negligent (or defective) lack of a knuckle pin can be seen as a cause of an injury sustained while replacing a fallen knuckle.

Several of the cases upon which NSRC relies either predate *Rogers*[6] or are based on the reasoning of the now overruled *Reetz* or similar reasoning,[7] and therefore they are not controlling. Other cases are distinguishable because the injury was solely attributed to plaintiff's own negligence.[8] An Ohio

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uated to conclude that the defect caused the injury. Take for example the following scenario: a train goes into an emergency stop due to defective air brakes; and an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured. A court reasonably could find no causation as a matter of law in these situations.

Id. at n. 5

[6] *McCalmont v. Penn. R. Co.*, 283 F. 736 (6th Cir.1922).

[7] *Green v. River Terminal R. Co.*, 763 F.2d 805 (6th Cir.1985); *Central of Ga. R. Co. v. Clark*, 95 Ga.App. 325, 98 S.E.2d 85 (1957) (following *Reetz*); *Powell v. Waters*, 55 Ga.App. 307, 190 S.E. 615 (1937) (reasoning similar to *Reetz*).

[8] See *Kelson v. Central of Ga. R. Co.*, 234 Ga.App. 200, 505 S.E.2d 803; *Radford v. Seaboard Coast Line R. Co.*, 122 Ga.App. 763, 178 S.E.2d 774 (1970).

case, cited by NSRC, can only be described as one where the connection between the negligence and the plaintiff's injuries was too attenuated as described in footnote 5 of *Richards*.[9] Finally, *Brooks v. Southern R. Co.*, 178 Ga.App. 361, 343 S.E.2d 143 (1986), upon which NSRC relies, is factually distinguishable and therefore not controlling. In that case, there was no evidence of any negligence by the railroad.

We find NSRC's reliance on the rule set forth in *Davis v. Wolfe*, 263 U.S. 239, 44 S.Ct. 64, 68 L.Ed. 284 (1923) to be unpersuasive. The *Davis* court noted that an employee cannot recover if the negligence or defect merely created "an incidental condition or situation in which the accident, otherwise caused, results in ... injury." *Id.* at 243, 44 S.Ct. 64. This case is different because the negligence that had led to the fallen knuckle can be seen as playing a part, "even the slightest," in producing Schumpert's injury. *Rogers*, 352 U.S. at 506, 77 S.Ct. 443.

2. NSRC contends that evidence of Schumpert's future lost NSRC wages should have been excluded because Schumpert was properly fired only eight months after the injury for violating company policies by never reporting the accident and by misrepresenting the reason he had missed work. Schumpert no longer disputes that he was properly fired or that his termination was upheld following proceedings conducted pursuant to the Railway Labor Act, 45 USC-§ 151 et seq. The trial court allowed evidence of Schumpert's possible future earnings from NSRC. As a consequence, Schumpert presented evidence of the difference between what

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[9] See *Reed v. Penn. R. Co.*, 171 N.E.2d 718, (Ohio 1961), cert. denied, 366 U.S. 936, 81 S.Ct. 1661, 6 L.Ed.2d 847 (1961) (45 minutes after the train was stopped because of a brake defect, the engineer, who was not required to assist with the repair, slipped and fell while descending from a ladder on his cab in response to a direction to make a telephone call to give an update on the movement of the train).

he was making with a new employer and what he would have made at NSRC.

But federal case law directly on point controls this issue adversely to NSRC. See *Kulavic v. Chicago &c.*, 1 F.3d 507 (7th Cir.1993); *Pothul v. Consolidated Rail Corp.*, 94 F.Supp.2d 269, 270 (N.D.N.Y.2000); *Graves v. Burlington Northern &c., R. Co.*, 77 F.Supp.2d 1215 (E.D.Okla.1999). The only federal case on point cited by NSRC, *Kulavic v. Chicago &c. R. Co.*, 760 F.Supp. 137 (C.D.Ill.1991), was reversed by *Kulavic*, 1 F.3d 507. We find no error.

Our decision also governs NSRC's claim that the jury should have been instructed that this same evidence could not be used to support a lost earnings claim.

Judgment affirmed.

RUFFIN, P.J., and ELDRIDGE, J., concur.

APPENDIX B

COURT OF APPEALS OF GEORGIA.

No. A04A1438.

NORFOLK SOUTHERN RAILWAY COMPANY

v.

SCHUMPERT.

Filed Nov. 10, 2004

ADAMS, Judge.

Under the Federal Employers' Liability Act (FELA), railroad companies are liable for injuries to their employees that result in whole or in part from company negligence. In this case, company negligence caused a railroad-car coupling device to fall to the ground. Conductor James Hugh Schumpert injured his back when he replaced the 90-pound device. The main issue presented here is whether his injury can be said to have resulted, either in whole or in part, from the negligence that caused the device to fall.

Schumpert sued Norfolk Southern Railway Company (NSRC) for his injury and based his complaint on FELA,[1] and the Federal Safety Appliance Act (FSAA).[2] Following a jury trial, NSRC moved for a directed verdict with regard to both claims. The trial court granted the motion on the FSAA claim but denied it on the FELA claim. Thereafter, the jury returned a verdict against NSRC in the amount of $596,681.41, which was entered as the court's judgment.

[1] 45 USC § 51 et seq.

[2] 49 USC § 20301 et seq.

NSRC moved for judgment notwithstanding the verdict and for new trial. The trial court denied the motions, and NSRC appeals.

The standard of review in this situation is well known:

> In determining whether the trial court erred by denying [the appellant's] . . . motion[ ] for judgment n.o.v., this court must view and resolve the evidence and any doubt or ambiguity in favor of the verdict. A directed verdict and judgment n.o.v. are not proper unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a certain verdict.

(Citations and punctuation omitted.) *Irwin County v. Owens*, 256 Ga.App. 359, 360(2), 568 S.E.2d 578 (2002).

The parties largely agree on the material facts. Construing those facts in favor of the verdict, the evidence shows that Schumpert was the NSRC conductor assigned to move a train from Atlanta to Commerce, Georgia, on August 20, 1999. During the trip, some of the train cars had to be turned around, which required a switching operation. Utility brakeman Debra Lusk assisted with this operation, which involved separating some of the cars to turn them around and then reassembling the train.

The part of a train car's coupler that interlocks with another car's coupler is called a "knuckle." Knuckles, which are attached to drawbars that are fastened to the housing of the train car, are designed to break-off under certain conditions so as not to damage the drawbar and the car itself. A "knuckle pin" holds the knuckle in place when the knuckle is in the open position, but a pin is not required when the knuckle is in the closed position (even when the car is coupled to another car). In order to perform the required switching operation, Lusk had to open knuckles on cars that were going to be connected to the reassembled train. Lusk negligently failed to

notice a missing pin on one knuckle, and when she opened it, the knuckle fell harmlessly to the ground.

Schumpert was 200 to 300 yards away at the time, but he came over to help. Lusk was pregnant, which Schumpert had heard, and so Schumpert decided to replace the knuckle himself. There was expert testimony that replacing knuckles is a two-man job, but there was also testimony that it could be performed by one person. Schumpert believed that he was capable of replacing the knuckle himself because he had done so "over and over again" in the past; he considered it a regular part of his job. In fact, he had replaced a different knuckle earlier that same day. Lusk, too, had replaced four knuckles by herself in the past.

The parties do not dispute on appeal that Schumpert was injured as a result of lifting the knuckle to replace it. And there is no contention that Schumpert himself was negligent in any way. Rather, the causation question in this case is whether the negligence that led the knuckle to fall can be said to have caused Schumpert's injury because he had to replace the fallen knuckle.

1. The common law definition of causation is not applicable here, as even NSRC acknowledged at oral argument. The United States Supreme Court has called FELA "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pac. R.Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958). FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. [Cit.]" Id.

Under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1

L.Ed.2d 493 (1957).[3] Nevertheless, some evidence of causation is required; FELA is not a no-fault workers' compensation statute. *Consolidated R. Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994). Whether the employee's own negligence contributed to the injury is immaterial unless it can be seen as the sole proximate cause of the accident. See, e.g., *Kelson v. Central of Georgia R. Co.*, 234 Ga.App. 200, 505 S.E.2d 803 (1998).

NSRC characterizes Schumpert's claim as follows: "'But for' Lusk's failure to observe the missing knuckle pin, [Schumpert] would not have been faced with the task of replacing a knuckle." NSRC contends that "but for" causation is insufficient. We find, however, that more than "but for" causation is present here.

Federal law interpreting FELA governs this issue. *Bagley v. CSX Transp.*, 219 Ga.App. 544, 545-546, 465 S.E.2d 706 (1995). A recent federal case on FELA causation guides our analysis. See *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir.2003), cert. denied, *Consolidated Rail Corp. v. Richards*,—U.S. —, 124 S.Ct. 961, 157 L.Ed.2d 807.[4] In that case a train made an unexpected stop as a result of an alleged defect in the braking system. In response, Conductor Richards attempted to determine the cause of the stop by walking the length of the train and inspecting for visible causes. *Id.* at 431. At some point, Richards lost his footing and allegedly injured his back. Id.

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[3] As stated in the FELA, the carrier is liable for injuries or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 USC § 51.

[4] Although *Richards* is analyzed under the FSAA, causation analysis under FELA and FSAA are the same. *Richards*, 330 F.3d at 433, n. 2.

The Sixth Circuit was faced with long-standing precedent from its own court in which it had been held that there was a difference between an act of negligence that causes an injury and one that merely creates a condition or incidental situation under which an employee is injured:

> [T]here is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.

Reetz v. Chicago & Erie R. Co., 46 F.2d 50, 52 (6th Cir.1931). The *Richards* court noted that in 1957, in the critical *Rogers* decision mentioned above, the United States Supreme Court announced a relaxed test for establishing causation in FELA cases. *Richards*, 330 F.3d at 433. After analyzing that standard and cases interpreting it, the *Richards* court "rejected *Reetz* in light of *Rogers* and [held] that *Reetz* no longer is good law." Id. at 437. The *Richards* court reiterated the *Rogers* test and further explained "that if a reasonable jury could find that the plaintiff's injury 'was within the risk created by' the defective appliance (or the negligence), the plaintiff's right to a jury trial should be preserved." Id.

> For example, if as a result of a defective appliance a plaintiff is required to take certain actions and he or she is injured taking those actions, the issue of causation generally should be submitted to a jury.

Id. Accordingly, the *Richards* court held that there was a question of material fact regarding whether the allegedly defective brakes caused Richards's injurious fall.[5]

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[5] In a footnote, the *Richards* court explained that there are limitations to its decision:

> Admittedly scenarios will arise where the connection between the defective appliance and the plaintiff's injuries become too attenu-

We therefore conclude that the trial court properly submitted to the jury the question of whether NSRC's negligence played any part, even the slightest, in causing Schumpert's injury. Schumpert was acting directly in response to the negligence and he was lifting the very item that fell due to the negligence. His injury can be seen as being within the risk created by NSRC's negligence. Our conclusion is consistent with one federal and one state case that have addressed the same set of facts. See *Chicago M., etc. R. Co. v. Goldhammer*, 79 F.2d 272 (8th Cir.1935), cert. denied, 296 U.S. 655, 56 S.Ct. 382, 80 L.Ed. 467 (1936); *Hendrick v. CSX Transp.*, 575 So.2d 709 (Fla.D.Ct.App.1991). In each case the court specifically concluded that the negligent (or defective) lack of a knuckle pin can be seen as a cause of an injury sustained while replacing a fallen knuckle.

Several of the cases upon which NSRC relies either predate *Rogers*[6] or are based on the reasoning of the now overruled *Reetz* or similar reasoning,[7] and therefore they are not controlling. Other cases are distinguishable because the injury

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> ated to conclude that the defect caused the injury. Take for example the following scenario: a train goes into an emergency stop due to defective air brakes; and an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured. A court reasonably could find no causation as a matter of law in these situations.

Id. at n. 5

[6] *Davis v. Wolfe*, 263 U.S. 239, 44 S.Ct. 64, 68 L.Ed. 284 (1923); *McCalmont v. Penn. R. Co.*, 283 F. 736 (6th Cir.1922).

[7] *Green v. River Terminal R. Co.*, 763 F.2d 805 (6th Cir.1985); *Central of Georgia R. Co. v. Clark*, 95 Ga.App. 325, 98 S.E.2d 85 (1957) (following *Reetz*); *Powell v. Waters*, 55 Ga.App. 307, 190 S.E. 615 (1937) (reasoning similar to *Reetz*).

was solely attributed to plaintiff's own negligence.[8] An Ohio case, cited by NSRC, can only be described as one where the connection between the negligence and the plaintiff's injuries was too attenuated as described in footnote 5 of *Richards*.[9] Finally, *Brooks v. Southern R. Co.*, 178 Ga.App. 361, 343 S.E.2d 143 (1986), upon which NSRC relies, is factually distinguishable and therefore not controlling.

2. NSRC contends that evidence of Schumpert's future lost NSRC wages should have been excluded because Schumpert was properly fired only eight months after the injury for violating company policies by never reporting the accident and by misrepresenting the reason he had missed work. Schumpert no longer disputes that he was properly fired or that his termination was upheld following proceedings conducted pursuant to the Railway Labor Act, 45 USC § 151 et seq. The trial court allowed evidence of Schumpert's possible future earnings from NSRC. As a consequence, Schumpert presented evidence of the difference between what he was making with a new employer and what he would have made at NSRC.

But federal case law directly on point controls this issue adversely to NSRC. See *Kulavic v. Chicago & Ill. Mid. R. Co.*, 1 F.3d 507 (7th Cir.1993); *Pothul v. Consolidated Rail Corp.*, 94 F.Supp.2d 269, 270 (N.D.N.Y.2000); *Graves v. Burlington N., etc., R. Co.*, 77 F.Supp.2d 1215 (E.D. Ok.1999). The only federal case on point cited by NSRC,

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[8] See *Kelson v. Central of Georgia R. Co.*, 234 Ga.App. 200, 505 S.E.2d 803; *Radford v. Seaboard Coast Line R. Co.*, 122 Ga.App. 763, 178 S.E.2d 774 (1970).

[9] See *Reed v. Penn. R. Co.*, 171 Ohio St. 433, 171 N.E.2d 718, cert. denied, 366 U.S. 936, 81 S.Ct. 1661, 6 L.Ed.2d 847 (1961) (45 minutes after the train was stopped because of a brake defect, the engineer, who was not required to assist with the repair, slipped and fell while descending from a ladder on his cab in response to a direction to make a telephone call to give an update on the movement of the train).

Kulavic v. Chicago & Ill. Mid. R. Co., 760 F.Supp. 137 (C.D.Ill.1991), was reversed by the first case cited above. *Kulavic*, 1 F.3d 507. We find no error.

Our decision also governs NSRC's claim that the jury should have been instructed that this same evidence could not be used to support a lost earnings claim.

Judgment affirmed.

RUFFIN, P.J., and ELDRIDGE, J., concur.

APPENDIX C

IN THE STATE COURT OF HALL COUNTY
HALL COUNTY GEORGIA

[Filed Feb 9, 2004]

Case No. 2002SV001116D

JAMES HUGH SCHUMPERT,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY CO.,
Defendant.

ORDER

I. MOTION TO AMEND OR ALTER THE JUDGMENT REGARDING THE RATE OF INTEREST TO BE APPLIED

Defendant filed a Motion to Modify or Amend Post Judgment Interest ordered by this Court and argued that the amount of post judgment interest should be modified to meet that which is allowed within Federal District Court. 28 U.S.C. § 19-61(a) sets out the interest rate that is allowable within Federal District Court. However, it is the Court's opinion that post judgment interest is a matter of procedure and not substance. Consequently, state law would govern matters of procedure while federal law would govern substantive matters. That being the case, Defendant's motion to alter the interest rate is hereby denied and post judgment interest shall remain at the State of Georgia rate of twelve percent (12%).

II. MOTION FOR A NEW TRIAL

Defendant argued that the jury had considered awarded damages to the Plaintiff that included wages he would not

have earned from Defendant following his April 14, 2000 dismissal from Norfolk Southern Railway. This matter had been dealt with in a Motion in Limine prior to commencement of the trial. At that time, the Court had allowed Plaintiff to submit evidence of his future earnings and benefits and his future earning capacity lost or reduced as a result of any negligence on the part of Norfolk Southern Railway. The Court followed the substantive law as it found it to be. Specifically, the Court looked at cases such as *Graves v. Burlington Northern and Santa Fe Railroad Company*, 77 F.Supp.2d 1215 (E.D. OKLA. 1999). Additionally, the Court looked at cases such as *Pothul v. Consolidated Rail Corporation*, 94 F. Supp. 2d 269 (N. D. N. Y. 2000). Using this substantive law made by different and varying Federal District Courts, the ruling in the Motion in Limine would remain the same in this Motion for New Trial, and said motion is hereby denied. The Court does believe the subsidive law from the Federal Courts indicates that those wages and benefits could have been considered by the jury in reaching their verdict.

III. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Acts of directing a verdict or granting a motion for judgment notwithstanding the verdict declares that there is no conflict in the evidence, and that all deductions and inferences from the evidence introduced demands particular verdict. *Johnson v. Curenton*, 126 Ga. App. 687 (1972). Looking at this standard in the light most favorable to the verdict, the Court can find conflicts existed as to material issues. Some of these areas included the fact that the drawhead was missing a particular pin, which had allowed the coupler to fall out when open. Beyond this mere fact also existed evidence that because of the procedures, which had to be used for the replacement of that pin, Plaintiff had to improvise a manner for opening the draw while inserting the head. While the

replacement of these drawheads and pins may have been a common occurrence upon the railroad, requirements to install such and whether the railroad was liable because of that is a material issue, which the jury has determined. Consequently, the Motion for Judgment Notwithstanding Verdict is hereby denied.

SO ORDERED this 5th day of February 2004.

/s/ B. E. Roberts, III
B. E. ROBERTS, III
Judge, State Court of Hall County

APPENDIX D

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: June 30, 2005

William C. Thompson
WEISSMAN, NORWACK, CURRY & WILCO, P.C.
One Alliance Center, Fourth Floor
3500 Lenox Road
Atlanta, GA 30326

Case No. S05C0672

NORFOLK SOUTHERN RAILWAY COMPANY,

v.

JAMES HUGH SCHUMPERT.

COURT OF APPEALS CASE NO. A04A1438

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

APPENDIX E

FEDERAL EMPLOYERS' LIABILITY ACT (excerpts)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

SAFETY APPLIANCE ACT (excerpt)

49 U.S.C. § 20302. General requirements

(a) General.—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

* * * *

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 881.)

No. 05-405

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES H. SCHUMPERT,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

No. 05-405

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES H. SCHUMPERT,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

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[1] The letter expressing consent has been filed with the Clerk of the Court.

[2] *E.g., Illinois Cent. R.R. v. Smallwood*, 125 S.Ct. 1825 (2005); *National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City*

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. Because FELA litigation is an ongoing event for all major railroads—several thousand FELA suits are filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. In this case, the court below improperly expanded railroad liability under FELA by abrogating the concept of proximate cause. This holding, which is the product of a misapplication of a prior precedent of this Court, confers a serious and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in

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Southern Ry. Co. v. Giddens, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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October 26, 2005

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51-60, a 95 years old negligence statute under which railroad employees who are injured on the job may seek compensation from the employing railroad. FELA presents unique issues and problems for railroads as it differs fundamentally from the compensation systems covering virtually all other U.S. industries: subsequent to FELA's enactment, every state enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation.[2] Despite the advent of workers' compensation, FELA remains intact, and each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR mem-

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[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

[2] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. § 688, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Most states enacted workers' compensation laws of general application between 1910 and 1920, with Mississippi being the last in 1948. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L. & Econ. 305, 320 (1998).

ber railroads. All told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Thus, FELA litigation is an ongoing event for all major railroads, to which they devote substantial legal and financial resources.

This case is of great interest to AAR's members because the issue presented goes to the fundamental nature of FELA as a compensation statute. Despite admonitions from this Court that FELA does not make the employer the insurer of its employees' safety and health, numerous lower courts, typically in reliance on this Court's decision in *Rogers v. Missouri Pac. RR.*, 352 U.S. 500 (1957), interpret FELA otherwise. This case is a stark example of the tendency among some lower courts to erode the concept of negligence on which FELA is based, and is representative of what is commonly an overbroad and erroneous reading of *Rogers*. The impact of these decisions on FELA litigation cannot be understated.

The decision below is of great alarm to the nation's railroads because it serves to expand railroad liability under FELA beyond what was intended by the statute or any reasonable reading of this Court's precedents, causing it to resemble a no-fault compensation law. And, because unlike employers subject to workers' compensation, FELA defendants face uncapped liability in each and every case, the decision below foretells serious financial consequences for the nation's railroads. Therefore, this case of utmost interest to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the petition.

SUMMARY OF THE ARGUMENT

The petition should be granted to correct a serious misreading of this Court's prior precedent. The court below misread *Rogers v. Missouri Pac. R.R.*, which, properly read,

does not have direct application to this case, while, at the same time, dismissing another prior precedent that does. The result was a holding that the FELA eliminates the concept of proximate cause, badly misconstruing a federal law of unique importance to the railroad industry.

In *Davis v. Wolfe*, 263 U.S. 239 (1923), this Court clearly enunciated FELA's causation standard, holding that railroads are not liable under FELA where the violation of a safety statute is not the proximate cause of the injury, but only creates an incidental situation that ultimately results in the injury. Subsequently, in *Rogers* this Court held that where there is evidence suggesting more than one possible proximate cause of an injury, the case should go to the jury. *Rogers* and *Davis* addressed different issues, and the former never questioned the latter. The court below paid no heed to *Davis*, rather, it adopted a recent decision of the Sixth Circuit holding that, as interpreted by *Rogers*, the phrase "in whole or in part" in FELA requires abandonment of the *Davis* holding. However, since FELA's enactment this Court has consistently interpreted the statute to require a showing of proximate cause, and lower courts remain obligated to apply that standard.

While some lower courts continue faithfully to apply the negligence and causation standards which Congress incorporated into FELA, the *Rogers* decision has been utilized by other courts to affect substantive changes to the law of negligence that go far beyond the specific modifications to the common law that Congress intended when it enacted FELA. As a result, in many jurisdictions FELA hardly resembles the statute Congress enacted in 1908. This Court should take the opportunity to clarify the *Rogers* holding to assure that lower courts properly interpret the FELA.